IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GERALD RODRIGUEZ DURAN, Petitioner.	)	2 CA-CR 2006-0252-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-46180

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Gerald Rodriguez Duran — Tucson
In Propria Persona

P E L A N D E R, Chief Judge.

¶1 After pleading guilty in 1995, Gerald Duran was convicted of burglary, aggravated assault with a deadly weapon, and two counts of sexual assault, all dangerous felonies. He was sentenced to presumptive terms of imprisonment, some to be served concurrently and some consecutively, totaling twenty-one years. Later that year, Duran filed his first notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S.,

and argued he had been denied effective assistance of counsel and had been exposed to double punishment. The sentencing judge denied relief. After several motions for reconsideration were denied, Duran sought relief in this court by way of special action. We declined jurisdiction of his petition, and Duran sought no further review.

¶2 Duran filed his second notice of post-conviction relief on May 10, 2004. He had recently been diagnosed with "cyclothymic disorder and/or bipolar disorder," and in his petition below, he argued that this diagnosis constituted newly discovered evidence under Rule 32.1(e) that entitled him to be resentenced. The trial court concluded Duran had failed to state a colorable claim for relief and summarily dismissed his petition.

¶3 In his petition for review, Duran contends the trial court abused its discretion by denying his requested relief without an evidentiary hearing. Absent an abuse of discretion, we will affirm a trial court's determination that a Rule 32 petitioner has failed to state a colorable claim. *State v. Krum*, 183 Ariz. 288, 293, 903 P.2d 596, 601 (1995). We find no abuse of discretion here.

¶4 A defendant is entitled to an evidentiary hearing only if the post-conviction petition presents a colorable claim. *Id*. at 292, 903 P.2d at 600. Among other requirements established by our supreme court, in order to state a colorable claim for relief based on newly discovered evidence, "the evidence must appear on its face to have existed at the time of trial but be discovered after trial." *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989) (colorable claim stated under Rule 32.1(e) where defendant was diagnosed,

several years after sentencing, as having suffered from post-traumatic stress disorder at the time of sentencing).

¶5 The trial court found Duran had failed to meet this requirement. The court explained that Duran had undergone a court-ordered psychological evaluation in 1995, prior to his sentencing hearing, and an Arizona Department of Corrections (ADOC) mental health assessment in 1999, but there had been no evidence from either examination "to suggest that he was suffering from any mental disorder . . . [or] defect." The court continued:

> The only evidence that [Duran] now sets forth are his medical records from ADOC, which provide that [he] was diagnosed with cyclothymic and/or bipolar disorder in March of 2004, nine years after he was sentenced. . . . [but they] . . . provide [no] indication that [Duran]'s mental disorder existed at the time he committed the offenses or at the time of sentencing.

¶6 Despite the absence of specific evidence that his mental disability existed at the time of his sentencing hearing, Duran argues he had stated a colorable claim because medical treatises suggest that the onset of cyclothymic disorder usually occurs in adolescence or early adulthood.[1] According to Duran, the conclusions of the earlier psychological evaluations simply create a conflict in the evidence that must be resolved at an evidentiary hearing. Duran relies on *State v. Wagstaff*, 161 Ariz. 66, 775 P.2d 1130 (App. 1988), *aff'd in part and vacated in part on other grounds*, 164 Ariz. 485, 794 P.2d 118 (1990). He cites *Wagstaff* for the proposition that when a court is in doubt about

[1]Duran was born on July 3, 1970.

whether a colorable claim exists, "a hearing should be held to allow the petitioner to raise the relevant issues and to make a record for review." *Id*. at 72, 775 P.2d at 1136. We do not find this argument persuasive.

¶7 In *Krum*, our supreme court cautioned that *Wagstaff* should be read narrowly and held that hearsay evidence, standing alone, does not "automatically entitle a Rule 32 petitioner to an evidentiary hearing." *Krum*, 183 Ariz. at 293-94, 903 P.2d at 601-02. Emphasizing that "[c]ircumstances will of course vary," the court explained that a trial court may consider the credibility of the offered hearsay, as well as other evidence in the case, when making the threshold determination of whether a defendant has stated a colorable claim. *Id*. at 294, 903 P.2d at 602. Both *Krum* and *Wagstaff* were recantation cases. In *Wagstaff*, evidence of undue influence over the young victim's testimony was held to support the need for an evidentiary hearing. 161 Ariz. at 72, 775 P.2d at 1136. In *Krum*, evidence corroborating the victim's original testimony was held to support the trial court's discretion to dismiss the petition summarily. 183 Ariz. at 295, 903 P.2d at 603. In this case, where no direct evidence supports Duran's suggestion that he was mentally ill at the time of his sentencing hearing, and previous examinations, performed closer in time to the hearing, found no evidence of mental illness, we cannot say the trial court abused its discretion in summarily dismissing Duran's petition.

¶8 The trial court denied relief in a detailed minute entry that clearly identified Duran's arguments and ruled on them in a manner that is factually supported by the record

before us and legally supported by the authorities cited therein. We therefore adopt the trial court's ruling on Duran's claim. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶9 Although we grant the petition for review, we deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge